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Lake Shore Motor Coach Lines, Inc. v. Public Service Comm. Of Utah et al : Answer to Petition for Rehearing

Utah Supreme Court

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**IN THE SUPREME COURT
OF THE
STATE OF UTAH**

LAKE SHORE MOTOR COACH LINES,
INC., a Utah corporation,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; HAL S. BENNETT, DONALD
HACKING, And JESSE R. S. BUDGE,
Its Commissioners; WYCOFF COM-
PANY, INCORPORATED, a corporation,

Defendants.

Case No.
8861

ORSON LEWIS, doing business as Lewis
Bros. Stages, and BINGHAM STAGE
LINES, a corporation,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH; HAL S. BENNETT, DONALD
HACKING, And JESSE R. S. BUDGE,
its Members; WYCOFF COMPANY, IN-
CORPORATED, a corporation,

Defendants.

Case No.
8863

ANSWER TO PETITION FOR REHEARING

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ANSWER TO PETITION FOR REHEARING

The plaintiffs jointly answer the defendants' Peti-
tion for Rehearing and Brief in Support of Petition for
Rehearing as follows:

POINT I.

THE RECORD IN THIS CASE ESTABLISHES CLEARLY THAT THERE IS NO SUBSTANTIAL EVIDENCE THAT SERVICE RENDERED BY PLAINTIFFS IS INADEQUATE OR SUBSTANDARD, AND THERE CAN BE NO FINDING WHICH IS NOT SUPPORTED BY THE EVIDENCE.

POINT II.

THE COURT PROPERLY FOUND THAT THERE WAS NO EVIDENCE BY DEFENDANTS' WITNESSES THAT THEY WERE AWARE OF THE PRESENT SERVICE AVAILABLE, HAD USED SAME, AND THAT THEY WERE DISSATISFIED THEREWITH.

POINT III.

SECTION 54-6-5, UTAH CODE ANNOTATED, 1953, AS AMENDED, GIVES THE COMMISSION POWER TO PROVIDE FOR COMMON CARRIER SERVICE, AND ALSO PROVIDES THAT UNNECESSARY DUPLICATION OF SERVICE BE PREVENTED. THE COURT PROPERLY FOUND THAT THE DEFENDANT WYCOFF COMPANY WAS BOUND TO SHOW THE INADEQUACY OF EXISTING SERVICE. THE POLICY OF PROTECTION OF EXISTING CARRIERS HAS LONG BEEN ESTABLISHED.

POINT IV.

IF AN ORDER OF THE PUBLIC SERVICE COMMISSION IS NOT BASED ON EVIDENCE, SUCH AN ORDER IS BY LAW ARBITRARY AND CAPRICIOUS, AND THE COURT PROPERLY FOUND THIS TO BE THE CASE.

POINT V.

PLAINTIFFS ARE CONCERNED ONLY AS THE COMMISSION'S ORDER AFFECTS THE TERRITORIES THEY SERVE.

POINT VI.

THIS POINT OF DEFENDANTS' PETITION IS NOT APPLICABLE TO THESE PLAINTIFFS.

POINT VII.

THE COURT HAS PROPERLY PERFORMED ITS DUTY TO REVIEW THE ORDER OF THE PUBLIC SERVICE COMMISSION TO DETERMINE WHETHER THERE IS ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION OF THE COMMISSION.

POINT VIII.

THE COURT HAS PROPERLY FOUND THAT IT NEED NOT CONSIDER WHETHER THE AUTHORITY GRANTED TO WYCOFF IS AN "UNIDENTIFIABLE HYBRID."

ARGUMENT

Plaintiffs believe that no purpose would be served in arguing each of these points individually, for when the defendant Wycoff's position is analyzed, it becomes apparent that the entire issue is one of evidence. The plaintiffs assume that the Court properly discharged its duty and carefully considered the points of fact and law

raised by the parties, and in connection therewith examined the record of the proceedings. Defendant Wycoff has raised no new points, and now in support of the Petition for Rehearing merely details testimony which has been before the Court. It might be pointed out that in so doing the portions of testimony quoted are in some cases set forth without consideration to cross examination, and such statements, out of context, reflect only the most favorable possible inference available to support the Commission's order.

But even these statements of witnesses, as carefully as they have been selected, provide no showing of necessity which is basic to support an application for a certificate of convenience and necessity. Take, for example, the testimony of Mr. Joseph Madsen, set forth on pages 22-24 of defendants' brief. Mr. Madsen stated that the services of the bus lines had been very satisfactory, with the exception of the inconvenience of pick up and delivery. Obviously he was unaware that such service was provided by plaintiff Lake Shore Motor Coach Lines.

The testimony of Mr. Kuhre of Strevell-Paterson (Defendants' brief page 26) was that the then proposed Wycoff service would be "quite a convenience"; that bus service again was satisfactory with the exception of inconveniences such as parking problems. Mr. Kuhre's testimony indicated that he, too, was not thoroughly familiar with the services which were available, for he stated that the buses would not handle COD shipments. All of these plaintiffs handle such shipments.

The Walgreen representative was not familiar with existing service. He indicated that particularly with reference to shipments handled to Ogden a pick up and delivery "would convenience us quite a bit more." (Defendants' brief page 30). He further testified that there were ample schedules by the bus lines to meet shipping needs, and the only objection registered was, once again, "The inconvenience has been taking it over and getting it from there."

Mr. J. Arthur Knudsen of Knudsen Builders Supply (defendants' brief page 36) testified that his objection to the bus service was one of cost. Cost factors did not enter into the hearing and could not be considered in establishing convenience and necessity.

"Convenience" only again appears as the prime consideration in the testimony of Ted R. Brown of Refrigeration Distributors Corporation; of Mr. Richard Frank Ream of Automotive Service Co.; of L. W. Cracroft of Hemingway & Moser Company.

An analysis of the testimony presented in defendants' Appendix of Evidence reveals again and again this weakness: The defendant Wycoff did not meet his burden of establishing necessity for additional service in the territories served by these plaintiffs. The Commission erroneously found "necessity" from the testimony of shippers to the effect that they would like a multiplicity of carriers as a matter of convenience, without regard to the economic consequences.

There is no need to detail statutory or case law pertaining to the review of administrative decisions. All of the parties to this action have heretofore submitted arguments based on law, and such law has not been altered in the interim. An examination of defendants' citations reveals no disagreement as to the general provisions. Plaintiffs reiterate that the entire issue involved is whether there was substantial evidence upon which the Commission could base its Order, and respectfully submit that the Court correctly found there was not.

Respectfully submitted,

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